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 North Las Vegas Police Department, North Las Vegas,  
 Lieutenant Michael Blackwell, Officer Shayne Skipworth,  
 Officer Jake Hickman, Officer Gary Nellis, Officer Jose Garcia,  
 and Sergeant George Middlebrook

**UNITED STATES DISTRICT COURT**

**STATE OF NEVADA**

\* \* \* \* \*

PHYLISS HUFF,

Plaintiff,

vs.

NORTH LAS VEGAS POLICE DEPARTMENT, a  
 political subdivision of the State of Nevada;  
 NORTH LAS VEGAS, a political subdivision of  
 the State of Nevada; CHIEF OF POLICE  
 JOSEPH FORTI, individually and in his  
 capacity as Chief of Police of the North Las  
 Vegas Police Department; MICHAEL  
 BLACKWELL, individually and in his official  
 capacity as a Lieutenant with the North Las  
 Vegas Police Department; SHAYNE  
 SKIPWORTH, individually and in his official  
 capacity as a North Las Vegas Police Officer;  
 JAKE HICKMAN, individually and in his  
 official capacity as a North Las Vegas Police  
 Officer; GARY NELLIS, individually and in his  
 official capacity as a North Las Vegas Police  
 Officer; INVESTIGATOR GARCIA, individually  
 and in his official capacity as a North Las  
 Vegas Police Officer; GEORGE  
 MIDDLEBROOK, individually and in his  
 official capacity as a sergeant employed by  
 the North Las Vegas Police Department;  
 JOHN DOES I though XX, inclusive

Defendants.

Case No.: 2:10-cv-1394-PMP-GWF

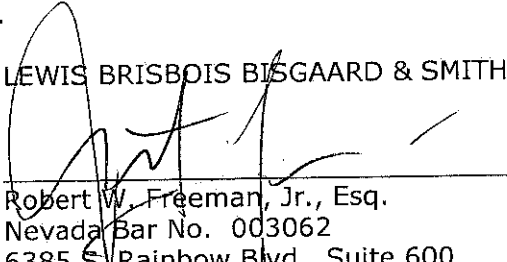
**NOTICE OF INTERLOCUTORY  
 APPEAL**

**NOTICE OF INTERLOCUTORY APPEAL**

NOTICE IS HEREBY GIVEN that Defendants, CHIEF OF POLICE JOSEPH FORTI, individually and in his capacity as Chief of Police of the North Las Vegas Police Department, MICHAEL BLACKWELL, individually and in his official capacity as a Lieutenant with the North Las Vegas Police Department; SHAYNE SKIPWORTH, individually and in his official capacity as a North Las Vegas Police Officer; JAKE HICKMAN, individually and in his official capacity as a North Las Vegas Police Officer; GARY NELLIS, individually and in his official capacity as a North Las Vegas Police Officer; INVESTIGATOR GARCIA, individually and in his official capacity as a North Las Vegas Police Officer; GEORGE MIDDLEBROOK, individually and in his official capacity as a sergeant employed by the North Las Vegas Police Department, do appeal to the United States Court of Appeals for the Ninth Circuit from the Order of the district court entered and filed on December 23, 2013, denying Defendants' Motion for Summary Judgment [85].

Dated this 16 day of January, 2014.

LEWIS BRISBOIS BISGAARD & SMITH

  
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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on the 16 day of January, 2014, pursuant to Special Order #109, I caused the **NOTICE OF INTERLOCUTORY APPEAL** to be filed electronically with the Clerk of the Court through Case Management/Electronic Filing System. Pursuant to Local Rule 5-4, "[t]ransmission of Notice of Electronic Filing ("ECF") constitutes service of the filed documents" upon the following (to the extent registered as an electronic case filing user with the Clerk):

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Employee of LEWIS BRISBOIS  
BISGAARD & SMITH

UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

\* \* \*

PHYLLIS HUFF,

Plaintiff,

v.

NORTH LAS VEGAS POLICE  
DEPARTMENT; OFFICER GARCIA;  
JOSEPH FORTI; MICHAEL  
BLACKWELL; SHAYNE SKIPWORTH;  
JAKE HICKMAN; GARY NELLIS;  
GEORGE MIDDLEBROOK; and CITY  
OF NORTH LAS VEGAS,

Defendants.

2:10-CV-01394-PMP-GWF

ORDER

Presently before the Court is Defendants' Motion for Summary Judgment (Doc. #67), filed on April 29, 2013. Plaintiff filed an Opposition (Doc. #82) on August 5, 2013. Defendants filed a Reply (Doc. #83) on August 22, 2013.

**I. BACKGROUND**

This is an excessive force and unreasonable detention case against several officers of the North Las Vegas Police Department ("NLVPD") arising out of Defendants' traffic stop of Plaintiff Phyllis Huff. Plaintiff brings claims under 42 U.S.C. § 1983 against Defendants Jake Hickman ("Hickman"), Shayne Skipworth ("Skipworth"), Gary Nellis ("Nellis"), Jose Garcia ("Garcia"), Michael Blackwell ("Blackwell"), and George Middlebrook ("Middlebrook"). (Am. Compl. (Doc. #30).) Plaintiff also asserts claims against Defendant City of North Las Vegas ("City") and its Chief of Police, Defendant Joseph Forti ("Forti"), for failure to train and supervise NLVPD police officers, and for ratifying excessive force by NLVPD officers. (*Id.*) Finally, Plaintiff brings state law claims for battery and intentional infliction of emotional distress. (*Id.*)

1 On August 22, 2008, Defendants Hickman, Skipworth, Nellis, Garcia, Blackwell,  
2 and Middlebrook were conducting a narcotics investigation related to the residence at 8704  
3 Azure Sky, which was the home of suspected narcotics trafficker Devon Bradley. (Defs.'  
4 Mot. Summ. J. ["Defs.' MSJ"], Ex. A, Ex. B at 11, Ex. G at 16-17.) Prior to the incident  
5 with Plaintiff, Defendants stopped two other vehicles that left the residence. (Defs.' MSJ,  
6 Ex. A.) In one of the vehicles, police discovered over 3,000 ecstasy tablets in the  
7 possession of a narcotics trafficker whom the undercover officers had contacted earlier to  
8 request 3,000 ecstasy tablets. (Id.; Defs.' MSJ, Ex. B at 7-8.) The second vehicle failed to  
9 stop for police and drove erratically. (Defs.' MSJ, Ex. A.) The passenger in the vehicle  
10 was Devon Bradley, who was arrested for conspiracy to violate the Controlled Substances  
11 Act based on the earlier seizure of the ecstasy tablets. (Id.) The driver of the second  
12 vehicle was taken to the hospital after complaining of medical issues related to his diabetes,  
13 and Defendant Blackwell accompanied him to the hospital. (Id.)

14 At approximately 9:30 p.m., a green sedan, which had been parked at the  
15 residence when the officers began surveillance on the day in question, left the residence.  
16 (Defs.' MSJ, Ex. A, Ex. C at 11.) This vehicle was driven by Plaintiff. The parties differ  
17 over what happened next.

18 According to the officers, as the green vehicle approached where Defendant  
19 Hickman was parked alongside the curb, Hickman rolled down his window, waved to the  
20 driver, identified himself as a police officer, presented his badge, and asked to speak to the  
21 driver. (Defs.' MSJ, Ex. C at 12-13.) Hickman was not wearing a uniform and was in an  
22 unmarked Ford truck. (Id.) The driver of the green sedan drove away. (Id. at 14.)  
23 Hickman denies that he had any further involvement with stopping the green sedan. (Id. at  
24 15.)

25 Defendant Garcia was stationed outside the housing development in which the  
26 Azure Sky residence was located. (Defs.' MSJ, Ex. D at 15.) Garcia was driving an

1 unmarked Nissan Pathfinder and he was not wearing a police uniform. (Id. at 15-16, 30.)  
2 According to Garcia, he exited his vehicle and raised up his hand to get the driver of the  
3 green sedan to stop, but the driver did not stop. (Id. at 14, 38.) According to Garcia, he was  
4 not further involved in stopping the green sedan and he arrived on the scene after the driver  
5 already had been stopped and placed in handcuffs. (Id. at 21, 23.)

6 Defendant Skipworth observed the driver “accelerate[] and drive[] erratically out  
7 of the complex,” and the driver did not stop until pulled over by Defendant Nellis, who had  
8 activated the emergency lights on his car. (Defs.’ MSJ, Ex. A, Ex. B at 24, Ex. E at 17.)  
9 According to Skipworth and Nellis, the driver, who turned out to be Plaintiff, exited the  
10 vehicle and then got back into the car and closed the door. (Defs.’ MSJ, Ex. A, Ex. B at 9,  
11 Ex. E at 21.) Nellis and Skipworth ran up to the car. (Defs.’ MSJ, Ex. E at 21.) The driver  
12 side window was down, and Skipworth “reached in, [and] stopped [Plaintiff] from putting  
13 the car in gear.” (Defs.’ MSJ, Ex. B at 9.) According to Nellis, Skipworth “controlled  
14 [Plaintiff] by grabbing her wrist.” (Defs.’ MSJ, Ex. E at 23.) Nellis and Skipworth  
15 “maneuver[ed] her out of the vehicle,” Nellis put her in handcuffs, and escorted her to the  
16 front of a police vehicle. (Defs.’ MSJ, Ex. A, Ex. B at 22-23, Ex. E at 27.) Plaintiff did not  
17 resist. (Defs.’ MSJ, Ex. E at 28.) Defendants deny that Plaintiff was physically abused.  
18 (Defs.’ MSJ, Ex. B at 22, 31, Ex. E at 30, Ex. G at 38.) Defendants deny they observed any  
19 injuries on Plaintiff or that Plaintiff complained of any injuries. (Defs.’ MSJ, Ex. D at 31,  
20 Ex. G at 38-39.) At some point, Nellis put an extra set of handcuffs on Plaintiff to widen  
21 the distance between her wrists to make it more comfortable. (Defs.’ MSJ, Ex. B at 32-33,  
22 Ex. E at 28-29.)

23 The officers transported Plaintiff to the Azure Sky residence. (Defs.’ MSJ, Ex. B  
24 at 9.) Officers secured a warrant for the residence, and the search revealed marijuana,  
25 ecstacy, cocaine, and drug-related paraphernalia. (Id.) Plaintiff was detained while the  
26 officers searched the house and attempted to determine if she had any connection to the

1 narcotics in the house. (Defs.' MSJ, Ex. B at 33, 35.) Following the search, Plaintiff was  
2 released and no charges were filed against her because there was no probable cause to  
3 connect her with the drugs in the home. (Defs.' MSJ, Ex. B at 9, 33.)

4 According to Plaintiff, she left the Azure Sky residence after doing her laundry  
5 there. (Defs.' MSJ, Ex. I at 46.) As she left the residence, she saw a man waving at her  
6 who asked to speak with her. (Id. at 39-40.) She denies that the man identified himself as a  
7 police officer or that he displayed a badge. (Id.) She believed he was flirting with her, and  
8 she advised him she was not interested, and drove away. (Id. at 53-54, 57-58.) She noticed  
9 the man started following her in his truck, and she became afraid. (Id.) Not long after she  
10 drove out of the housing area, she pulled over after a police car activated its lights. (Id. at  
11 60.) She did not recall exiting her vehicle and getting back in as described by Skipworth  
12 and Nellis, but she does not deny that could have happened. (Id. at 62-63.)

13 According to Plaintiff, four or five officers approached her vehicle, someone  
14 punched her in the head twice, and she was forcefully removed from the vehicle by  
15 someone grabbing her left arm. (Id. at 63-64, 70.) She was then "charged" toward an  
16 officer's truck and slammed into the truck three times. (Id. at 63, 69, 71-74.) The officers  
17 were yelling profanities at her, saying things such as "you think you were going to get away  
18 from us, you fucking bitch . . . [t]his is what a fucking runner gets, you motherfucker." (Id.  
19 at 67.) She was then searched by male officers under her shirt and pants. (Id. at 82-84.)  
20 The officers then placed her in a patrol car for approximately two or three hours while they  
21 searched her vehicle. (Id. at 77.) She was then taken to the Azure Sky residence for  
22 approximately two more hours while the officers searched the house. (Id. at 78-79.) She  
23 was not released until 2:30 a.m. (Id. at 79.) She denies her handcuffs were ever loosened  
24 despite her multiple requests. (Id. at 63, 74, 80.)

25 Plaintiff states she suffered pain to her shoulders, back, upper lip, and left ankle,  
26 as well as damage to a dental bridge from the incident. (Id. 87-89.) That night, she took



1 some Tylenol and went to bed because she had to get up for work in a few hours. (Id. at  
2 91.) Plaintiff could not complete her shift at work, went home, took more medicine, and  
3 went to bed. (Id. at 91-92.) Her nephew told her she should see a doctor, but she stated she  
4 was too scared because the hospital might call the police. (Id. at 92.) Two days later, her  
5 nephew went with her to Mountain View Hospital. (Id. at 92-93.) At the hospital, Plaintiff  
6 complained of back and neck pain, and a headache. (Defs.' MSJ, Ex. J.) The hospital  
7 record does not reflect that Plaintiff complained about pain related to her ankle. (Id. at 8.)  
8 The treating physician diagnosed "contusion, neck pain, and back pain," as well as a mild  
9 headache. (Id. at 9, 12.) The contusions were on Plaintiff's left arm. (Id.) The treating  
10 physician did not note any "obvious external trauma" to Plaintiff's head. (Id. at 10.) The  
11 treating physician also did not observe any injury to Plaintiff's mouth, but the physician  
12 indicated a fracture of a dental bridge might be something she would not see upon  
13 examination unless the bridge was protruding. (Id. at 14, 17.) Plaintiff states she did not  
14 tell the emergency room doctor about pain in her mouth, instead going to her dentist.  
15 (Defs.' MSJ, Ex. I at 96.)

16 The hospital contacted the police and an officer from the Las Vegas Metropolitan  
17 Police Department arrived. (Defs.' MSJ, Ex. I at 93-94, Ex. L.) After determining the  
18 incident involved NLVPD officers, NLVPD lieutenant Randy Salyer ("Salyer") was  
19 contacted, and he interviewed Plaintiff at the hospital. (Defs.' MSJ, Ex. L.) Salyer asked  
20 Plaintiff to fill out a complaint form and requested that he be allowed to take pictures of  
21 Plaintiff. (Id.) Salyer took photos, but Plaintiff did not fill out a complaint form, and  
22 Salyer left the hospital. (Id.) Salyer observed marks on Plaintiff's arm and wrist, but saw  
23 no other injury. (Id.)

24 Following the complaint reported to Salyer, Skipworth and Nellis spoke to their  
25 supervisor, Defendant Middlebrook, about the incident. (Defs.' MSJ, Ex. B at 16, Ex. E at  
26 10-11.) Hickman was not questioned by Middlebrook. (Defs.' MSJ, Ex. C at 18.) None of



1 the officers were questioned by an internal affairs officer regarding this incident. (Defs.'  
2 MSJ, Ex. B at 16, Ex. D at 34, Ex. E at 10-11.) On September 24, 2008, Middlebrook sent  
3 a memo to his supervisor, Defendant Blackwell, concluding that Plaintiff's allegations of  
4 excessive force were unfounded. (Defs.' MSJ, Ex. H.)

5 A month or two after the incident, Plaintiff obtained an MRI on her ankle which  
6 showed cysts, but it was inconclusive as to whether the condition was pre-existing, or was  
7 caused or exacerbated by the incident with the police. (Defs.' MSJ, Ex. I at 96-97.)  
8 According to Plaintiff, after the incident her dental plate was loose, and became more loose  
9 over time, but she did not seek treatment from her dentist until 2010. (*Id.* at 98.) Plaintiff  
10 states she still experiences pain in her neck, back, shoulder, and ankle. (*Id.* at 99.)

11 Defendants now move for summary judgment on all of Plaintiff's claims.  
12 Defendants argue they are entitled to qualified immunity on Plaintiff's excessive force and  
13 unreasonable detention claims because the stop was supported by reasonable suspicion,  
14 Defendants did not use an unreasonable amount of force under the circumstances, and  
15 Defendants reasonably detained Plaintiff while her connection to the house and the drugs  
16 was being investigated. Defendants argue they are entitled to summary judgment on  
17 Plaintiff's claim against the City because Plaintiff has no evidence of a policy or custom as  
18 the moving force behind her alleged injuries, and Plaintiff has no evidence of a failure to  
19 train amounting to deliberate indifference. Defendants also argue they are entitled to  
20 discretionary immunity on Plaintiff's state law claims, and that these claims nevertheless  
21 fail on the merits. Finally, Defendants argue Plaintiff has not established she is entitled to  
22 punitive damages.

23 Plaintiff responds that genuine issues of fact remain regarding whether  
24 Defendants used excessive force where Plaintiff stopped when pulled over by someone  
25 identifiable as a police officer, did not resist, but nevertheless was punched in the face and  
26 slammed onto the hood of a vehicle. Plaintiff also argues her detention for five hours

1 without probable cause that she had committed a crime was unreasonable. Plaintiff  
2 contends Defendants are not entitled to qualified immunity because a reasonable officer  
3 under the circumstances would know the force was excessive and would know they cannot  
4 use force to retaliate against Plaintiff for allegedly being a “runner.” Plaintiff contends a  
5 reasonable officer would know the detention was unreasonable based on a Nevada statute  
6 limiting detention based on reasonable suspicion to one hour.

7 As to municipal liability, Plaintiff argues NLVPD has a policy or custom of  
8 violating the constitutional rights of persons they believe are attempting to flee. Plaintiff  
9 also argues issues of fact remain as to whether NLVPD has a meaningful internal affairs  
10 process and whether NLVPD has a policy or custom of failing to discipline officers.  
11 Finally, Plaintiff argues NLVPD ratified the officers’ conduct because there was no  
12 meaningful investigation and no officers were punished. Finally, as to the state law claims,  
13 Plaintiff argues Defendants’ actions were not the kind of acts entitled to discretionary  
14 immunity under Nevada law.<sup>1</sup>

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18 <sup>1</sup> In their Reply, Defendants argue “Plaintiff fails to provide any points and authorities in  
19 support of any claim against Defendants Joseph Forti, Michael Blackwell, Jake Hickman, Jose Garcia,  
20 or George Middlebrook.” (Defs.’ Reply in Support of Mot. for Summ. J. (Doc. #83) at 5.) However,  
21 Defendants’ Motion for Summary Judgment did not make arguments specific to any individual  
22 Defendant’s liability, instead referring to all individual Defendants collectively as “Defendants” or  
23 “Defendant Officers.” (See, e.g., Defs.’ MSJ at 15-16, 18, 24-25, 29.) Defendants did not argue in  
24 their initial Motion that these particular Defendants had no personal participation in the events in  
25 question and could not be liable on the basis of respondeat superior. The Court will not grant summary  
26 judgment based on arguments Defendants raise for the first time on reply. Nevertheless, the Court  
reminds Plaintiff of her obligations under Federal Rule of Civil Procedure 11 as it relates to  
Defendants Forti and Blackwell. None of the briefing or evidence mentions Forti as playing any role  
in the incident, either directly or indirectly. The evidence presented also indicates Defendant  
Blackwell was at the hospital with another individual pulled over that night and had no participation  
in stopping and detaining Plaintiff. Plaintiff therefore should consider whether she has a good faith  
basis to maintain her remaining claims against these Defendants.

## II. DISCUSSION

Summary judgment is appropriate if the pleadings, the discovery and disclosure materials on file, and any affidavits show that “there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a), (c). A fact is “material” if it might affect the outcome of a suit, as determined by the governing substantive law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). An issue is “genuine” if sufficient evidence exists such that a reasonable fact finder could find for the non-moving party. Villiarimo v. Aloha Island Air, Inc., 281 F.3d 1054, 1061 (9th Cir. 2002). Initially, the moving party bears the burden of proving there is no genuine issue of material fact. Leisek v. Brightwood Corp., 278 F.3d 895, 898 (9th Cir. 2002). If the moving party meets its burden, the burden shifts to the non-moving party to produce evidence that a genuine issue of material fact remains for trial. Id. The Court views all evidence in the light most favorable to the non-moving party. Id.

### A. Counts One and Two - Violation of Constitutional Rights

To establish liability under 42 U.S.C. § 1983, a plaintiff must allege the violation of a right secured by the Constitution and laws of the United States, and must show that the alleged deprivation was committed by a person acting under color of state law. Broam v. Bogan, 320 F.3d 1023, 1028 (9th Cir. 2003). To allay the “risk that fear of personal monetary liability and harassing litigation will unduly inhibit officials in the discharge of their duties,” government officials performing discretionary functions may be entitled to qualified immunity for claims made under § 1983. Anderson v. Creighton, 483 U.S. 635, 638 (1987). Qualified immunity protects “all but the plainly incompetent or those who knowingly violate the law.” Malley v. Briggs, 475 U.S. 335, 341 (1986). In ruling on a qualified immunity defense, a court considers whether the facts viewed in the light most favorable to the party asserting the injury show the defendant’s conduct violated a constitutional right. Sorrels v. McKee, 290 F.3d 965, 969 (9th Cir. 2002). If the plaintiff

1 makes this showing, the court then must determine whether that right was clearly  
2 established. Id.

3 A right is clearly established if “it would be clear to a reasonable officer that his  
4 conduct was unlawful in the situation he confronted.” Wilkins v. City of Oakland, 350  
5 F.3d 949, 954 (9th Cir. 2003) (emphasis omitted) (quoting Saucier v. Katz, 533 U.S. 194,  
6 202 (2001)). The court should make this second inquiry “in light of the specific context of  
7 the case, not as a broad general proposition.” Saucier, 533 U.S. at 201. An officer will be  
8 entitled to qualified immunity even if he was mistaken in his belief that his conduct was  
9 lawful, so long as that belief was reasonable. Wilkins, 350 F.3d at 955. The plaintiff bears  
10 the burden of showing that the right at issue was clearly established. Sorrels, 290 F.3d at  
11 969. But a plaintiff need not establish a court previously declared the defendant’s behavior  
12 unconstitutional if it would be clear from prior precedent that the conduct was unlawful.  
13 Blueford v. Prunty, 108 F.3d 251, 254 (9th Cir. 1997). Additionally, a plaintiff may meet  
14 his burden on the clearly established prong by showing the defendant’s conduct was “such a  
15 far cry from what any reasonable . . . official could have believed was legal that the  
16 defendants knew or should have known they were breaking the law.” Sorrels, 290 F.3d at  
17 971.

18 The parties do not dispute that Defendants acted under color of law. The only  
19 remaining questions related to counts one and two are whether Defendants violated  
20 Plaintiff’s clearly established constitutional rights by using excessive force or unreasonably  
21 detaining Plaintiff.

#### 22 1. Excessive Force

23 Courts analyze claims that law enforcement officers have used excessive force in  
24 the course of an arrest under the Fourth Amendment to the United States Constitution.  
25 Smith v. City of Hemet, 394 F.3d 689, 700 (9th Cir. 2005) (citing Graham v. Connor, 490  
26 U.S. 386 (1989); Ward v. City of San Jose, 967 F.2d 280 (9th Cir. 1992) (as amended)). In

1 determining the reasonableness of a non-deadly force seizure, the Court must balance “the  
2 nature and quality of the intrusion on the individual’s Fourth Amendment interests against  
3 the countervailing government interests at stake.” Miller v. Clark County, 340 F.3d 959,  
4 964 (9th Cir. 2003) (quotations omitted). This entails a three-step analysis. Id. First, the  
5 Court must assess “the gravity of the particular intrusion on Fourth Amendment interests by  
6 evaluating the type and amount of force inflicted.” Id. Second, the Court must assess “the  
7 importance of the government interests at stake by evaluating: (1) the severity of the crime  
8 at issue, (2) whether the suspect posed an immediate threat to the safety of the officers or  
9 others, and (3) whether the suspect was actively resisting arrest or attempting to evade  
10 arrest by flight.” Id. The Court may consider other factors, including “the availability of  
11 alternative methods of capturing or subduing a suspect.” Smith, 394 F.3d at 701.

12 Third, the Court weighs the gravity of the intrusion against the government’s  
13 interest to determine whether the amount of force was constitutionally reasonable. Miller,  
14 340 F.3d at 964. The reasonableness inquiry looks at all the relevant objective facts and  
15 circumstances that confronted the arresting officers in each particular case, “judged from  
16 the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of  
17 hindsight.” Drummond ex rel. Drummond v. City of Anaheim, 343 F.3d 1052, 1058 (9th  
18 Cir. 2003) (quotation omitted); Smith, 394 F.3d at 701. Additionally, the reasonableness  
19 analysis must consider the fact that “police officers are often forced to make split-second  
20 judgments – in circumstances that are tense, uncertain, and rapidly evolving – about the  
21 amount of force that is necessary in a particular situation.” Drummond, 343 F.3d at 1058  
22 (quotation omitted).

23 Because the reasonableness balancing test “nearly always requires a jury to sift  
24 through disputed factual contentions, and to draw inferences therefrom,” courts should  
25 grant summary judgment in excessive force cases “sparingly.” Id. at 1056. “This is  
26 because police misconduct cases almost always turn on a jury’s credibility determinations.”



1 Id. However, a court may decide reasonableness as a matter of law if, “in resolving all  
2 factual disputes in favor of the plaintiff, the officer’s force was objectively reasonable under  
3 the circumstances.” Jackson v. City of Bremerton, 268 F.3d 646, 651 n.1 (9th Cir. 2001)  
4 (internal quotation omitted).

5 Here, genuine issues of fact remain regarding whether Defendants used excessive  
6 force against Plaintiff. Viewing the facts in the light most favorable to Plaintiff, Defendants  
7 punched Plaintiff twice in the face, pulled her from her car by the arm, and slammed her  
8 into a car three times. As to the governmental interests at stake, Defendants stopped  
9 Plaintiff because she had emerged from a house connected to narcotics activity, but  
10 Defendants had no probable cause to suspect Plaintiff had committed any crime. There is  
11 no evidence Plaintiff posed an immediate threat to the safety of the officers or others, and  
12 Defendants admit Plaintiff did not resist the officers. While Defendants assert they thought  
13 Plaintiff might be attempting to flee when she got back into her vehicle, she did not engage  
14 in actual flight from the officers. Balancing the amount of force used against the  
15 governmental interests, Defendants punched Plaintiff twice and slammed her into a truck  
16 three times even though Defendants lacked probable cause that she had committed any  
17 crime, had no evidence that she was armed, and she was not resisting the officers. A  
18 reasonable jury could find Defendants used excessive force under the circumstances.

19 Defendants acknowledge Plaintiff’s version of events, to which she has testified  
20 under oath, differs from theirs, but Defendants suggest the Court should disregard  
21 Plaintiff’s version as lacking in credibility. However, the Court does not make credibility  
22 determinations at the summary judgment stage. Dominguez-Curry v. Nev. Transp. Dep’t,  
23 424 F.3d 1027, 1036 (9th Cir. 2005). Further, Defendants are not entitled to qualified  
24 immunity because a reasonable officer would know punching Plaintiff twice and slamming  
25 her into a car three times when she was not resisting would be unreasonable. See, e.g.,  
26 Davis v. City of Las Vegas, 478 F.3d 1048, 1054-55 (9th Cir. 2007); Lolli v. Cnty. of

1 Orange, 351 F.3d 410, 416 (9th Cir. 2003). The Court therefore will deny Defendants'  
2 Motion for Summary Judgment on Plaintiff's excessive force claim.

3 2. Unreasonable Detention

4 Police officers may make "limited intrusions on an individual's personal security  
5 based on less than probable cause." Michigan v. Summers, 452 U.S. 692, 698 (1981). An  
6 officer briefly may detain a suspect to maintain the status quo while investigating criminal  
7 activity. Id. (citing Adams v. Williams, 407 U.S. 143 (1972)). Such detentions may be  
8 made on less than probable cause, "so long as police have an articulable basis for suspecting  
9 criminal activity." Id. at 699.

10 To determine whether a seizure is permissible on less than probable cause, "it is  
11 necessary to examine both the character of the official intrusion and its justification." Id. at  
12 701. The Court uses the objective reasonableness test of the Fourth Amendment to  
13 determine whether the seizure was unreasonable. Graham v. Connor, 490 U.S. 386, 395  
14 (1989). Under this test, the Court balances "the nature and quality of the intrusion on the  
15 individual's Fourth Amendment interests against the countervailing governmental interests  
16 at stake." United States v. Enslin, 327 F.3d 788, 796 (9th Cir. 2003) (quotation omitted).  
17 Among the factors to consider are the severity of the crime at issue, whether the suspect  
18 posed an immediate threat to safety, and whether the suspect actively resisted arrest or fled.  
19 Graham, 490 U.S. at 396. The inquiry is fact specific, based on a totality of the  
20 circumstances. United States v. Turvin, 517 F.3d 1097, 1101 (9th Cir. 2008).

21 An investigative detention "must be temporary and last no longer than is  
22 necessary to effectuate the purpose of the stop." Florida v. Royer, 460 U.S. 491, 500  
23 (1983). Additionally, "the investigative methods employed should be the least intrusive  
24 means reasonably available to verify or dispel the officer's suspicion in a short period of  
25 time." Id.; see also United States v. Sharpe, 470 U.S. 675, 686 (1985) ("In assessing  
26 whether a detention is too long in duration to be justified as an investigative stop, we



1 consider it appropriate to examine whether the police diligently pursued a means of  
2 investigation that was likely to confirm or dispel their suspicions quickly, during which  
3 time it was necessary to detain the defendant.”). Consequently, to determine whether a  
4 seizure is unreasonable, the Court considers both “whether the officer’s action was justified  
5 at its inception, and whether it was reasonably related in scope to the circumstances which  
6 justified the interference in the first place.” Terry v. Ohio, 392 U.S. 1, 19-20 (1968). The  
7 government bears the burden of showing that “the seizure it seeks to justify on the basis of a  
8 reasonable suspicion was sufficiently limited in scope and duration to satisfy the conditions  
9 of an investigative seizure.” Royer, 460 U.S. at 500.

10 Here, viewing the facts in the light most favorable to Plaintiff, genuine issues of  
11 fact remain as to whether Defendants unreasonably detained Plaintiff. Plaintiff does not  
12 assert the stop was unjustified at its inception, but Defendants have failed to show no issue  
13 of fact remains that the duration and manner of the detention were reasonable. Defendants  
14 stopped Plaintiff because she had emerged from the house where suspected narcotics  
15 activity had taken place. Two other vehicles previously had left the house, one containing  
16 3,000 ecstasy tablets and the other refusing to stop. Defendants explained that they were  
17 concerned that one of the occupants of those vehicles may have called the residence and  
18 advised someone there to remove any contraband. (Defs.’ MSJ, Ex. B at 24.)

19 However, a stop must last no longer than is necessary to effectuate the purpose of  
20 the stop. Defendants assert as justification for the stop that they suspected Plaintiff may be  
21 spiriting away contraband. Defendants held Plaintiff for two or three hours while they  
22 searched Plaintiff’s vehicle. Defendants found no evidence of contraband and no evidence  
23 that Plaintiff was connected to narcotics trafficking or the Azure Sky residence other than  
24 that she had been inside the house. Defendants had no information from surveillance, a  
25 confidential informant, or any other source that Plaintiff was connected to the suspected  
26 narcotics activity at the residence. Once Defendants determined Plaintiff had not removed

1 contraband from the house as they suspected, and Defendants had no other information to  
2 support a reasonable suspicion that Plaintiff was engaged in criminal activity, Defendants  
3 nevertheless moved her from the location of the traffic stop to the Azure Sky residence and  
4 detained her there for approximately two more hours. It is unclear from the record how  
5 long, if at all, Plaintiff was detained after Defendants determined that Plaintiff had no  
6 connection to the residence or the narcotics activity. Defendants detained Plaintiff in  
7 handcuffs the entire time, even though she was unarmed, had not resisted the officers, and  
8 requested the handcuffs be adjusted for her comfort.<sup>2</sup> A reasonable jury could find  
9 Defendants detained Plaintiff for an unreasonable amount of time and in an unreasonable  
10 manner.

11 Further, Defendants are not entitled to qualified immunity on this claim because a  
12 reasonable officer would know he could detain a person based on reasonable suspicion only  
13 so long as necessary to effectuate the purpose of the stop, and the use of handcuffs during  
14 the detention must be reasonable. See, e.g., Royer, 460 U.S. at 500; Meredith v. Erath, 342  
15 F.3d 1057, 1062-63 (9th Cir. 2003). The Court therefore will deny Defendants' Motion for  
16 Summary Judgment on Plaintiff's unreasonable detention claim.

### 17 **B. Count Three - Violation of Constitutional Rights - Municipal Liability**

18 A municipal entity may be liable under § 1983 "only where the municipality  
19 itself causes the constitutional violation through execution of a government's policy or  
20 custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said  
21 to represent official policy." Ulrich v. City & Cnty. of S.F., 308 F.3d 968, 984 (9th Cir.  
22 2002) (quotation omitted). Additionally, claims "against a governmental officer in his  
23 official capacity is equivalent to a suit against the governmental entity itself," and thus  
24 governmental officers "are liable in their official capacities only if policy or custom played

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25 <sup>2</sup> Defendants contend they adjusted the handcuffs for Plaintiff's comfort, but the Court must  
26 accept Plaintiff's version as true.

1 a part in the violation of federal law.” Gomez v. Vernon, 255 F.3d 1118, 1126-27 (9th Cir.  
2 2001). A plaintiff may prove a municipal policy was the moving force behind a  
3 constitutional violation in three ways: (1) the municipality adopted an express policy; (2) a  
4 municipal employee commits a constitutional violation pursuant to the municipality’s  
5 longstanding practice or custom; or (3) the person causing the violation has final  
6 policymaking authority. Webb v. Sloan, 330 F.3d 1158, 1164 (9th Cir. 2003).

7 Plaintiff does not argue and has presented no evidence that an express policy of  
8 Defendant City was the moving force behind the alleged constitutional violations. Plaintiff  
9 presents no evidence that NLVPD had a custom or practice of violating the rights of  
10 persons they suspected of fleeing or that NLVPD has a custom or practice of not  
11 investigating allegations against its officers. Plaintiff presents no evidence of any incident  
12 beyond the one in which she was involved. McDade v. West, 223 F.3d 1135, 1141 (9th Cir.  
13 2000) (“A plaintiff cannot demonstrate the existence of a municipal policy or custom based  
14 solely on a single occurrence of unconstitutional action by a non-policymaking  
15 employee.”).

16 As to action by a final policymaker, a municipality “can be liable for an isolated  
17 constitutional violation if the final policymaker ‘ratified’ a subordinate’s actions.” Christie  
18 v. Iopa, 176 F.3d 1231, 1238 (9th Cir. 1999). To establish ratification, the plaintiff must  
19 prove a final policymaker knew of the alleged violation and approved of his or her  
20 subordinate’s act. Id. at 1239. Ratification generally is a fact question for the jury. Id. at  
21 1238-39.

22 Plaintiff has failed to raise a genuine issue of fact that a final policymaker ratified  
23 the officers’ conduct. Plaintiff has not identified who Plaintiff contends is a final  
24 policymaker. Further, Plaintiff has presented no evidence or argument to establish that  
25 individual is a final policymaker, and has presented no evidence or argument that individual  
26 knew of and approved of Defendants’ actions. The Court therefore will grant Defendants’

1 Motion for Summary Judgment as to Plaintiff's municipal liability claims against Defendant  
2 City of North Las Vegas and Defendants in their official capacities.

3 **C. State Law Claims**

4 **1. Discretionary Immunity**

5 Nevada Revised Statute § 41.032 sets forth exceptions to Nevada's general  
6 waiver of sovereign immunity. Pursuant to § 41.032(2), no action may be brought against a  
7 state officer or employee or any state agency or political subdivision that is "[b]ased upon  
8 the exercise or performance or the failure to exercise or perform a discretionary function or  
9 duty on the part of the State or any of its agencies or political subdivisions or of any officer,  
10 employee or immune contractor of any of these, whether or not the discretion involved is  
11 abused." To determine whether immunity for a discretionary act applies, Nevada utilizes a  
12 two-part test. First, an act is entitled to discretionary immunity if the decision involved an  
13 element of individual judgment or choice. Martinez v. Maruszczak, 168 P.3d 720, 729  
14 (Nev. 2007). Second, the judgment must be "of the kind that the discretionary function  
15 exception was designed to shield," which includes actions "based on considerations of  
16 social, economic, or political policy." Id. at 728-29 (quotations omitted).

17 Defendants' decisions regarding the amount of force necessary under the  
18 circumstances necessarily are discretionary as the decisions involve elements of individual  
19 judgment and choice. Evaluating how much force is necessary at any given moment  
20 involves examining the totality of the circumstances and making moment-to-moment  
21 decisions which may change in a rapidly evolving situation. Defendants' decisions  
22 therefore were discretionary in nature.

23 However, the Court concludes Defendants' conduct does not fall under the  
24 second prong of the test because Defendants' decisions regarding the amount of force to use  
25 are not the kind of decisions the discretionary function exception was designed to shield.  
26 Evaluating whether police officers used excessive force in any given situation does not

1 involve judicial second-guessing of legislative and administrative decisions grounded in  
2 social, economic, and political policy. The officers' obligations in this regard are grounded  
3 in the United States and Nevada Constitutions, not policy decisions from the legislative or  
4 executive branches. What level of force to use is not an integral part of governmental  
5 policy-making or planning. Imposing liability on officers who exceed the permissible use  
6 of force will not jeopardize the quality of the governmental process. Further, declining to  
7 apply the exception does not usurp the legislative or executive branch's power or  
8 responsibility. No branch of the government has the legitimate power to violate the Fourth  
9 Amendment of the United States Constitution. Defendants' conduct therefore does not fall  
10 within § 41.032 and Defendants are not entitled to discretionary immunity on Plaintiff's  
11 state law claim for battery. Because Plaintiff's state law intentional infliction of emotional  
12 distress claim is based on the alleged unreasonable use of force, Defendants likewise are not  
13 entitled to discretionary immunity on that claim.

## 14 2. Battery

15 Law enforcement officers "are privileged to use that amount of force which  
16 reasonably appears necessary, and are liable for battery to the extent they use more force  
17 than is reasonably necessary." Ramirez v. City of Reno, 925 F. Supp. 681, 691 (D. Nev.  
18 1996) (applying Nevada law). Consequently, the standard for battery by a police officer  
19 under Nevada law is the same as under § 1983. Id. As discussed previously, genuine issues  
20 of fact remain regarding whether Defendants used reasonable force. The Court therefore  
21 will deny Defendants' Motion for Summary Judgment on Plaintiff's battery claim.

## 22 3. Intentional Infliction of Emotional Distress

23 To establish a cause of action for intentional infliction of emotional distress under  
24 Nevada law, a plaintiff must establish: "(1) extreme and outrageous conduct with either the  
25 intention of, or reckless disregard for, causing emotional distress, (2) the plaintiff's having  
26 suffered severe or extreme emotional distress and (3) actual or proximate causation."



1 Olivero v. Lowe, 995 P.2d 1023, 1025 (Nev. 2000). “[E]xtreme and outrageous conduct is  
2 that which is outside all possible bounds of decency and is regarded as utterly intolerable in  
3 a civilized community.” Maduik v. Agency Rent-A-Car, 953 P.2d 24, 26 (Nev. 1998)  
4 (quotation omitted). “Liability for emotional distress generally does not extend to mere  
5 insults, indignities, threats, annoyances, petty oppressions, or other trivialities.” Burns v.  
6 Mayer, 175 F. Supp. 2d 1259, 1268 (D. Nev. 2001) (quotations omitted). To establish  
7 severe emotional distress, the plaintiff must demonstrate that “the stress [is] so severe and  
8 of such intensity that no reasonable person could be expected to endure it.” Alam v. Reno  
9 Hilton Corp., 819 F. Supp. 905, 911 (D. Nev. 1993).

10 Plaintiff has failed to present evidence or argument that she suffered extreme  
11 emotional distress as a result of the incident. The Court therefore will grant Defendants’  
12 Motion for Summary Judgment on Plaintiff’s intentional infliction of emotional distress  
13 claim.

#### 14 **D. Punitive Damages**

15 A plaintiff may obtain punitive damages under § 1983 if she proves the defendant  
16 acted maliciously, wantonly, or oppressively. Dang v. Cross, 422 F.3d 800, 807 (9th Cir.  
17 2005). “Conduct is malicious if it is accompanied by ill will, or spite, or if it is for the  
18 purpose of injuring another.” Id. (quotation omitted); see also Nev. Rev. Stat. § 42.001(3)  
19 (defining malice as “conduct which is intended to injure a person or despicable conduct  
20 which is engaged in the conscious disregard of the rights or safety of others”).

21 Although Plaintiff did not respond to Defendants’ Motion with respect to  
22 punitive damages, the Court will deny Defendants’ Motion because Defendants failed to  
23 meet their initial burden of establishing no genuine issue of fact remains that Plaintiff is not  
24 entitled to punitive damages. See Henry v. Gill Indus., Inc., 983 F.2d 943, 950 (9th Cir.  
25 1993). In support of their Motion, Defendants present Plaintiff’s deposition in which she  
26 testified that Defendants punched her and slammed her into a car while yelling things such

1 as "This is what a fucking runner gets." A reasonable jury could conclude from this  
2 evidence that Defendants acted with the purpose of injuring Plaintiff as punishment for her  
3 perceived attempt to flee. The Court therefore will deny Defendants' Motion for Summary  
4 Judgment as to punitive damages.

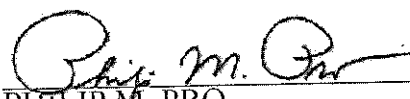
5 **III. CONCLUSION**

6 IT IS THEREFORE ORDERED that Defendants' Motion for Summary  
7 Judgment (Doc. #67) is hereby GRANTED in part and DENIED in part. The Motion is  
8 granted as to Plaintiff's claims against Defendant City of North Las Vegas and against the  
9 individual Defendants in their official capacities. The Motion also is granted as to  
10 Plaintiff's intentional infliction of emotional distress claim with respect to all Defendants.  
11 The Motion is denied in all other respects.

12 IT IS FURTHER ORDERED that the parties shall file a proposed joint pretrial  
13 order on or before January 31, 2014.

14 IT IS FURTHER ORDERED that this matter is referred to Magistrate Judge  
15 Foley for a settlement conference.

16  
17 DATED: December 23, 2013

18  
19   
20 PHILIP M. PRO  
21 United States District Judge  
22  
23  
24  
25  
26



**Freeman, Kristen**

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**ORDER Granting in Part and Denying in Part [67] Motion for Summary Judgment. Proposed Joint Pretrial Order due by 1/31/2014. This matter is referred to Magistrate Judge Foley for a settlement conference. Signed by Judge Philip M. Pro on 12/23/2013. (Copies have been distributed pursuant to the NEF - SLR)**

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